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Supreme Court, U.S.
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No. 01-1757

In The Supreme Court of the United States

MARION REYNOLDS STOGNER, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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SUMMARY OF THE ARGUMENT

The law that assured Petitioner and all persons similarly situated that the State could not prosecute let alone convict is no longer true so long as Penal Code Section 803(g) is sanctioned. The result is that 803(g) removes protections afforded to Petitioner and requires him to defend long after he was told otherwise, denies him the repose to which he is invested and has at times placed him in physical custody. The same result will apply to those similarly situated, and as the United States Solicitor General makes clear, once the power is sanctioned, the scope of this retroactive application knows no bounds. Thus every American is at risk of tremendous uncertainty in the finality of potential criminal prosecution, of relying on this finality to their detriment and of being exposed to the fundamentally unfair prosecution they were promised would *never* occur.

The State asks this Court to erase the legal landscape it has created through its legislative and judicial branches[1], to ignore the inherent finality accorded Statutes of Limitations which trigger double jeopardy and permit compelled testimony, and to lower this once insurmountable bar to prosecution. Yet, to do so would tear the meaning of the *Ex Post Facto* Clause from its moorings of notice, reliance and fundamental fairness.

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[1] "This Court, in applying the ex post facto prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when there meaning is thus established, ... whether the ... standard is more onerous ... within the meaning of the constitutional prohibition, [is a] federal question[] which this Court will determine itself." *Lindsey v. Washington*, 301 U.S. 397, 400 (1937).

Rather, the State asks this Court to consider the matter without reference to California law that has always promised that the passage of time ends the government's ability to prove or punish a public offense. In 1994, the State abruptly and without prior notice, began rewriting the law which was ultimately sanctioned in *People v. Frazer*, 21 Cal. 4th 737 (2000). This law was applied to Petitioner in *Stogner v. Superior Court*, despite specific legislation designed to protect his right.[2]

The *Frazer* Court separated the effect a completed Statute of Limitation had on the crime, the court's jurisdiction, and the punishment and turned instead to a version of *ex post facto* protections excluding certain *Calder* categories and viewing the Clause as only concerned with individual reliance which it found missing in the case before it. The court decided in the narrowest sense that the Statute of Limitations did not violate either prong of its limited definitions. In so doing, the State reneged on its invitation to citizens to reform and to invest in their freedom by rebuilding their lives, participating in their communities, building homes and families, working, and, ultimately, letting their guard down from the threat of prosecution. In short, the law invited reliance on its finality.

"There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000). In its legislative capacity, the State creates, extends and eliminates both civil and criminal Statutes of Limitation. Whether the legislature may in limited civil

[2] Penal Code section 805.5, if strictly construed, would bar the application of Penal Code section 803(g) to Petitioner.

circumstances revive time-barred causes of action[3] is not relevant here. For its role in the civil arena is, for all involved, as benefactor, providing as an impartial arbiter a forum for equally situated private parties to litigate their differences. There is no intent to favor either party. Wharton's Criminal Law § 444a (7th ed. 1874).

The motive underlying a statute designed to revive time barred criminal prosecutions could not be more different. Wharton, *supra*; *see also People v. McGee*, 1 Cal.2d 611, 613 (1934). Here the State acts in its prosecutorial role. The State is not a neutral arbiter merely providing a forum for litigants; it is a party with a vested interest in the outcome. Wharton, *supra*. It is in this role that the State is most exposed to the heated emotions of the masses. *See Calder v. Bull*, 3 U.S. 386, 389 (1798); *Fletcher v. Peck*, 10 U.S. 87, 137-8 (1810). It is here that the ground for arbitrary action is most fertile. It is in this context that Penal Code Section 803(g) or any revival statute must be analyzed. In relation to Petitioner[4] and those similarly situated, all vestiges of the State as benefactor vanish.

It was with this backdrop that "[t]he *Ex Post Facto* Clause was designed as 'an *additional* bulwark in favour of personal security of the subject' to protect against the 'favorite and most formidable instruments of tyranny' that were 'often used to effect the most detestable purposes'." *Carmell v. Texas*, 529 U.S. at 532.

[3] *See Campbell v. Holt*, 115 U.S. 620, 629 (1885); *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945).

[4] Petitioner is a retired 74 year old veteran of the Armed Forces. Petition to California Supreme Court, PT. XVII. He has limited economic resources, no criminal record, and has been incarcerated several times on this case. *Id.* His health is failing and he recently suffered a stroke. Dr. Duong Letter, October, 28, 2002.

Fundamental fairness, including the prevention of arbitrary and vindictive laws, underlies both the *Ex Post Facto* and the Due Process Clauses. *See Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). While the analysis and the reach of these two Clauses differ, both seek to maintain fundamental fairness in the law. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. at 353-4; *Rogers v. Tennessee*, 532 U.S. 441 (2001). Here, the Due Process inquiry is triggered by the State's encroachment on Petitioner's State guaranteed liberty.

Defendant has never been charged with any other criminal wrongdoing, and by 1976, Petitioner was free from the threat of this prosecution. Thus he was free from pretrial incarceration, free from handcuffs and shackles, free from the shame, humiliation and stigma associated with criminal charges, free from the financial and emotional costs of enduring a criminal prosecution and free from potential conviction and punishment. Surely it is this very freedom ranked as fundamental under the Due Process Clause of the United States Constitution. Nevertheless, the State has acted retroactively to deprive the Petitioner of this very freedom in a manner that violates both the Due Process and *Ex Post Facto* Clauses of the United States Constitution.

ARGUMENT

I. Penal Code Section 803(g) Violates the *Ex Post Facto* Clause

Drawing on a history steeped in instances of arbitrary and wanton legislative conduct, Justice Chase created the four *Calder* categories, legal constructs in which many factual scenarios could properly reside.

Calder v. Bull, 3 U.S. at 390-1. He used famous historical examples to illustrate past governmental abuses the *Calder* categories were designed to prohibit.

These examples targeted three distinct areas: *Calders* one and two prohibited laws respecting the crime; *Calder* three prohibited laws that affect the punishment; and *Calder* four prohibited laws respecting the legal rules of evidence. *Carmell v. Texas*, 529 U.S. at 522-23, citing 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 625-640 (1792) (Lecture 41). While some governmental action may violate more than one category, there is no evidence that Justice Chase ever intended the examples to limit the individual categories to a particular set of facts. Perhaps aware that such an interpretation might be given to his exposition, Justice Chase made clear that the examples were not meant to be finite but included "these and similar laws." *Calder v. Bull*, 3 U.S. at 391.

For instance, the significance of Sir Fenwick's case was not limited by the fact that it involved a Bill of Attainder but that it represented a situation in which retroactive alterations in evidentiary rules would violate the *Ex Post Facto* Clause. Nor did the factual circumstances underlying the Coventry Act of 1670[5] define the outer limits of *Calder* category three. For the Clause not only bars the imposition of a punishment greater than what existed at the time of offense but also prohibits retroactive revision of sentencing guidelines resulting in a greater sentence (*see Miller v. Florida*, 482 U.S. 423, 435-36 (1987)), prohibits the retroactive

[5] The Coventry Act of 1670 was enacted after John Coventry was assaulted in retaliation for supposed obnoxious statements made by him at Parliament. Individuals took it upon themselves to slit his nose. The law elevated the crime of mayhem to a felony without the benefit of clergy, transforming it for the first time into a capital offense. *See* 4 Blackstone's Commentaries 207; *see also* 2 Wooddeson's Lectures 638-39.

removal of a sentencing statute providing the potential to receive a lesser sentence (*see Lindsey v. Washington*, 301 U.S. 397, 401-402 (1937))and prohibits retroactively canceling provisional early release credits resulting in petitioner's re-arrest and re-incarceration. *See Lynce v. Mathis*, 519 U.S. 433, 445-6 (1997).

Thus the historical examples guide rather than limit, illustrate rather than define. They stand as a reminder of the ever-present potential for arbitrary and oppressive responses to emotional times. They underscore the mainstay of the *Ex Post Facto* Clause: fundamental justice. *See Carmell v. Texas*, 529 U.S. at 533.

Laws Respecting Evidence

California jurisprudence has instructed that failing to present evidence to show compliance with the Statute of Limitations is fatal to the prosecution. Penal Code section 803(g) reverses this result.

The California Supreme Court's decision in *People v. Frazer*, 21 Cal.4th 737 (1999), decided before *Carmell*, misconstrued *Collins* to narrow the original four *Calder* categories to two: "*Collins* made clear that the two categories of impermissible retroactive legislation–redefining criminal conduct and increasing punishment–are exclusive." *People v. Frazer*, 21 Cal.4th at 756. However, just two terms ago, this Court reaffirmed the existence of the fourth *Calder* category, (*Carmell v. Texas*, 529 U.S. at 537-8), and reestablished its position among those prohibitions which may *not* be evaded. *See Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

By reviving the Statute of Limitations, Penal Code section 803(g) permits the government to overcome an evidentiary burden that previously barred its prosecution. Through 803(g), the State seeks in its

current prosecution to present different testimony—testimony that no more than a year has passed since the initial report to law enforcement—rather than testimony that three years has not passed from the dates of the original allegations. Previously, the State's burden regarding the Statute of Limitations in Petitioner's case was impossible to meet. This is precisely what was thus prohibited in *Carmell*: the government may not alter the rules of evidence to admit less or different testimony for the purpose of securing a conviction. *See Carmell*, 529 U.S. at 530-1.

California jurisprudence places the burden of disproving the expiration of the Statute of Limitations in all stages of a criminal prosecution, from pleading to trial on the government.[6] The State now changes the evidentiary burden previously required to secure a conviction against Petitioner. Had charges been brought as the law provided until *Frazer*, the State would have had to produce testimony that the prosecution was not barred by the Statute of Limitations; testimony it would not have been able to produce. It has now relieved itself of that burden. Just as in *Carmell* and the case of Lord Fenwick, the State has altered its rules to secure a conviction.

Petitioner's situation however differs from *Carmell*

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[6] *See, e.g. People v. Crosby*, 58 Cal.2d 713, 724-5 (1962); *People v. Hoffman*, 132 Cal.App. 60, 62-3 (1933); *People v. Le*, 82 Cal.App.4th 1352, 1362 (2000). "In order to hold a defendant over for trial the People bear the burden of producing evidence (either before the grand jury or at the preliminary hearing) which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations." *People v. Zamora*, 18 Cal.3d 538, 565, n.26 (1976); *People v. Crosby*, 58 Cal.2d 713, 725 (1962) (same). *People v. Le*, 82 Cal.App.4th 1352, 1360-1 (defendants were entitled to an acquittal where the prosecution had failed to present evidence at trial that the case was not barred by the Statute of Limitations).

and Fenwick in that he has relied on the freedom afforded under the Statute of Limitations. For nearly three decades, Petitioner has invested in a life free from prosecution. He is a veteran. He has no criminal record. If Petitioner had been charged, convicted and sentenced within the relevant statutory period, in all likelihood he would have served his time and been returned to his community over twenty years ago.

Laws Respecting the Crime

California invites the Court to examine this matter without reference to its own laws, the same laws that give notice to its citizenry. Through Penal Code Section 803(g), it endeavors to go back in time to raze its own legislation and judicial rulings. It asks this Court to undo what it has done by its own hand and what it has promised Petitioner and others similarly situated that it would not do.

The State rather than relying on its own laws, redefines them, assuring us that its actions are justified by its good intentions. The State's intentions however are irrelevant; the proper focus in *ex post facto* analysis is on the results to Petitioner and others similarly situated.[7] *See Lynce v. Mathis*, 519 U.S. 433, 442 (1997).

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[7] Respondent and Amici spend much time emphasizing the "salutary purpose" of 803(g) as a measure to deal with child molestation. In *ex post facto* analysis they miss the point. It is the harm to Petitioner and all similarly situated that is the relevant consideration. In *Lynce*, a unanimous decision of this Court, in which seven Justices joined the opinion, and two concurred in the result, the Defendant was awarded credits, part of which were applied to him pursuant to a statute which was enacted after his crime was completed. *See Lynce v. Mathis*, 519 U.S. at 449. Nevertheless the court made clear that the focus of the *ex post facto* clause was the resulting harm to the defendant and not the legislature's intent of relieving overcrowding: "In arriving at our holding in *Weaver* we relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute "lengthen[ed] the period that someone in petitioner's position must spend in prison." *Id.* at 442.

Through its laws the State has repeatedly reaffirmed that, the passage of time extinguishes the public offense.[8] *See, e.g., People v. McGee*, 1 Cal.2d 611,

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[8] The Attorney General and Solicitor General argue that *ex post facto* concerns are not implicated here because the conduct was not "innocent when done" and because, the Attorney General argues, the Statute of Limitations is not an element of an offense where the government's burden of proof at trial is a mere preponderance of the evidence.

The recitation to Strafford as an example of acts that were not treasonous when done is but one tenant to be learned from the Earl's plight. It is not the only one. A historical event can, of course, account for more than one principle of law. *See Carmell v. Texas, 529 U.S. at 536.* It stands to reason therefore that such an event can also stand for more than one example of an *ex post facto* law.

The House of Commons sought to convict Strafford on twenty-eight (28) acts of treason. However, included in the charges were other acts which if prove, could be treasonous (The most serious charged concern his advice to the king, "you have an army in Ireland you may employ here to reduce this Kingdom." If "here" meant "England" it was treason; if it meant "Scotland", it was not. Strafford's meaning in that phrase was never determined. Craig Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford TRIAL* 69 CHICAGO L. REV. 2057, 2063.

The prosecution sought an attainder after its prosecution of Strafford began to collapse. *Id.* at 2085-6. Thus, Strafford had not been proven either factually or legally guilty of any crime. Although Strafford might have been guilty under existing law, this was not proved either at trial or during the Parliamentary hearing on his attainder. If Justice Chase meant only to include factual innocence, it is surprising that he did not raise this caveat when citing Strafford.

The attainder subsequently signed by King Charles I, represents yet another example of the evils sought to be eradicated through the *Ex Post Facto* clause. The King's assent was needed to complete the taint and put the subject to death. *Id.* at 2093. Yet prior to his return to England, and wary of Parliamentary machinations against him, the Earl sought and received the

613 (1934). In all crimes where applicable, the defendant has the potential to absolutely defeat a criminal accusation against him. Indeed in California, the procedural mechanisms available to him to assert this substantive right are many and varied.[9]

Yet Petitioner has been divested of the Statute of Limitations applicable to him and any procedural mechanisms that he would have used to defeat prosecution are now powerless. This divestment has occurred despite all notice to the contrary.

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assurances from the King, that "he should not suffer in his person, honour, or fortune." 109 Z. Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION of 1787 (1956). The Earl, reassured, returned to London only to suffer his fate, bemoaning not the attainder nor treason trial, but the treachery of the sovereign in revoking his promise. Strafford's last words were purportedly: "Put not your trust in Princes." *Id.* at 113. In its full understanding then, the Earl's plight mirrors Petitioner's own: The sovereign itself had promised Petitioner that he would be free from prosecution, his innocence would not be questioned, and he could rely on the word of the sovereign without detriment.

In sum, fundamental fairness requires that an *ex post facto* law not criminalize that which was not criminal before, not retroactively criminalize what it cannot legally prosecute, and that it not revoke its grants of liberty and safety from prosecution and punishment. Thus Strafford stands for legal and not factual innocence. Neither convictions nor acquittals are concerned with factual innocence. Indeed in California, disproving factual innocence is never required to prosecute, convict or punish. It would be a strain of all logic to suppose that because the Clause only deals with factual innocence, California's entire criminal laws are exempt from constitutional provisions dealing exclusively with crime, punishment, and the legal rules of evidence.

The question presented is whether Petitioner's conduct is punishable as a public offense. The answer is no. *People v. Asavis*, 27 Cal.App.2d 685, 687 (1938), *relying on People v. McGee*, 1 Cal.2d 611, 613 (1934); *People v. Crosby*, 58 Cal.2d 713, 722 (1962).

[9] A defendant may object at all stages of proceedings from pleading through trial and may raise it even after conviction.

In 1972, California ruled that reviving a time barred criminal matter violated *ex post facto*. *See Sobiek v. Superior Court*, 28 Cal.App.3d 846 (1972).[10] California was not the first to make such a pronouncement. Historical precedent had also concluded that retroactively abolishing the Statute of Limitations in a criminal matter already barred was unconstitutional. *See Calder v. Bull*, 3 U.S. at 389; *State v. Sneed*, 25 Tex.Supp. 66, 66 (1860); *Moore v. State*, 43 N.J.L. 203, 1881 WL 8329 *6 (1881). These conclusions, early on in this nation's history, show that criminal Statutes of Limitations expressed a finality that the State could not intrude upon.[11]

Laws Respecting Punishment

It violates the *Ex Post Facto* Clause to permit a court to punish for that which is, by law, not liable to any punishment. *See Calder v. Bull*, 3 U.S. 390-91. Here, even where there is a conviction the Statute of Limitations, when raised,[12] rescinds punishment,

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[10] Alternatively, it also ruled that extending a Statute of Limitation was permissible. *See People v. Snipe*, 25 Cal.App.3d 742 (1972).

[11] This rationale is buttressed by another common rule, that criminal Statutes of Limitations are to be strictly construed in favor of the accused. *See Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *People v. Zamora*, 18 Cal.3d 538, 574 (1976). Defendants are meant to benefit from this construction because of the underlying policies, i.e., that the defendant's case will be compromised by the delay in prosecution. These Statutes exist to nullify the district attorney's ability to push the burden onto the defendant to show that he has been prejudiced. It is simply presumed. It is one of the presumptions that underlie criminal Statutes of Limitations. The State is foreclosed from litigating the procedural claim.

[12] The Statute of Limitations may be raised after conviction either on appeal or pursuant to a *habeas corpus* petition. *See People v. Williams*, 21 Cal.4th 335, 341 (1999) (where the charging document indicates on its face that the case is time barred, the issue may be raised at any time); *Ex Parte Vice*, 5 Cal.App. 153 (1907) (pursuant to *habeas corpus* petition).

reverses the conviction and prevents the government from re-indicting.[13]

This Court has emphasized the importance of notice, reliance, and fundamental fairness in its decisions on retroactive punishment. Clearly, this Court's has not limited its analysis to prohibiting laws that retroactively increase the maximum term under the sentencing statute.

Thus in *Lindsey v. Washington*, 301 U.S. at 401-2 fundamental fairness was at the heart of a decision that ruled a retroactive change in a sentence transforming a maximum fifteen (15) year penalty into a minimum mandatory violated *ex post facto* even where the defendant may have received the same sentence under the old statute. The Court stated, "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey*, at 401.

Forty years later in *Weaver v. Graham*, 450 U.S. 24 (1981), the Court affirmed fair warning and reliance as the mainstays of *ex post facto* jurisprudence. In *Weaver*, the Court held that a State could not retroactively reduce good time credits for a prisoner who had not yet earned them. *Id.* at 25-6. "[A] law need not impair a 'vested right' to violate the *ex post facto*' prohibition." *Id.* at 29.

Notice was again discussed in *Miller v. Florida*,

[13]"A judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another" *United States v. Oppenheimer*, 242 U.S. at 85, 87(1916).

482 U.S. 423 (1987). Florida argued that it satisfied all notice concerns by including in the language of the statute that the sentencing guidelines were subject to change. *Id.* at 430-1. Thus, a retroactive change did not violate the *Ex Post Facto* Clause. *Id.* This Court held otherwise, stating that notice required the State to inform the defendant of the precise sentence he was exposed to. *Id.* at 431. Suggesting that a given method for calculating sentences was subject to change did not satisfy the notice requirement. *Id.* Moreover, the change was designed to punish sex offenders more harshly and this change directly targeted a class defendant was a member of. *Id.* at 433-4.

Finally in *Lynce v. Mathis*, 519 U.S. 433, 435-6 (1997) a prisoner was released from prison pursuant to provisional early release credits he earned under a statutory scheme designed to reduce prison overcrowding. The Court took notice of the disadvantage to an individual who has been released from prison and must be subjected to rearrest and re-incarceration following the retroactive cancellation of his time credits. *Id.* at 446-7.

In all, these cases focus their inquiry on notice, reliance, and fundamental justice. It is these very concerns that are at the root of the retroactive removal of a completed bar to prosecution.

The same sort of concerns are implicated by cases involving the retroactive removal of a pardon. For example, in *State v. Keith*, 63 N.C. 140, 1869 WL 1739 *2 (1869), a man was charged with murder for acts committed during the Civil War. Although the State granted immunity for crimes committed in the course of the war, it later repealed its Amnesty Act. *Id.* at * 2. The Supreme Court of North Carolina held that once a pardon had been issued, it could not be revoked: The act revoking amnesty was "substantially an ex post facto

law; it made criminal what, before the ratification of the ordinance was not; and it took away from the prisoner his vested right to immunity." *Id.* at *4.

It violates the Ex Post Facto clause to permit a court to inflict punishment on Petitioner where he was not, by law since 1976, liable to any punishment. *See Calder v. Bull*, 3 U.S. at 390-91.

II. The Purposes of the Ex Post Facto Clause are Implicated by a Retroactive Change in the Statute of Limitations.

California has notified Petitioner and others similarly situated, that it will prosecute child molest cases for a prescribed period of time, and that thereafter it will have no power to state a public offense, let alone prosecute, convict and punish said offense. California has instructed its citizens that they need not defend themselves because the crime is no more. They cannot separate the legal significance of the passage of time from Penal Code section 288. They cannot retroactively create a new offense and cause Petitioner to be subjected to it. To do so is fundamentally unjust and transgresses the *Ex Post Facto* Clause.

For the betterment of all, the government must abide by its own laws. "It is of much greater importance that the rules and interpretations should be certain, consistent, and applied alike to all, than that such particular case should meet with punishment." *Ex Parte Vice*, 5 Cal. App 153, 158-59 (1907); *see also Pendergast v. United States*, 317 U.S. 412, 418 (1943) ("Every statute of limitations, of course, may permit a rogue to escape."); California's arbitrary betrayal of its own laws is precisely what the *Ex Post Facto* Clause was designed

to protect against.[14]

The Statute of Limitations has consistently been treated by the courts as providing such finality[15] and such certainty that once the statute had run, persons have been prohibited from pleading the Fifth Amendment and have been forced to give testimony that would otherwise incriminate themselves. *See Brown v. Walker*, 161 U.S. 591, 597 (1896) (Holding that "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compelled to answer."). In these cases, because "the criminality has been removed" the privilege of the Fifth Amendment "ceases to apply" and persons could be compelled to testify. *See Hale v. Henkel*, 201 U.S. 43 (1906).

The Solicitor General contends *Stewart v. Kahn*, 78 U.S. 493 (1878) holds that States may revive criminal actions barred by the Statute of Limitations. They are wrong.[16] In *Kahn*, the federal government passed an act

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[14] The government also argues that the nature of child molestation provides ample support for reviving time barred prosecutions, as the perpetrator is able to conceal his or her crime thus preventing its disclosure or discovery. (Respondent's Brief at 29, 39-40.) The fact that an offender may conceal his crime is not unique to the type of offense, indeed a similar argument was made by the government in relation to conspiracy offenses in the past. As the *Zamora* Court succinctly stated: "[A]nyone who contemplates the commission of a crime realizes that he may be called upon to conceal evidence of his offense. In spite of that almost universal proposition, the Legislature has nevertheless been motivated to set a limitation period for the prosecution of most offenses." *People v. Zamora*, 18 Cal.3d 538, 572 (1976). The American Psycholgical Association, *et. al.*, amici offers little to the debate as their focus tends to support a prospective extension but provides nothing on the issue of retroactivity.

[15] See *Adams v. Woods*, 6 U.S. 336 (1805) (noting that "not even treason can be prosecuted after a lapse of three years").

[16] Properly understood, *Kahn* supports Petitioner's claim that a State may not defy its own laws in violation of the United States

during the civil war suspending the Statute of Limitations where it was not possible by "reason of resistance to the execution of the laws of the United States" to serve process. *Id.* at 494. The Federal act suspended the Statute of Limitations before it ran. *Id.* at. 500-01. In *dicta*, the Court observed that even if a criminal action had run under the law of the conquered state, revival would not have violated the constitution. *Id.* at 503-05. The Court's precedent reflects that hostilities suspend the running of the statute under established precedent and thus never expire during war. Thus State law was ineffectual to cause time to run. Nevertheless the Court was not confronted with the specific instance of revival of a criminal matter, *Kahn* therefore is distinguishable because it is based on precedent specifically applicable in times of war[17] Applying *Kahn*, a war powers case to Petitioner and those similarly situated is untenable.

During the twenty or so years since the Statute of Limitations has run, Petitioner has continued with his life. He is a veteran of the Armed Forces, having served his country during a time of foreign conflict in

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Constitution. It is easy enough to dismiss *Kahn* on the basis of dicta or the failure to analyze the case under either the *Ex Post Facto* or Due Process Clauses, however that is not necessary here. The principles upon which *Kahn* relies lend rather than detract from Petitioner's position for *Kahn* ultimately stands for the proposition that State power must be checked by and is subordinate to the Constitution and when it acts in defiance thereof its acts need not be accorded constitutional protection. *See also*, Hamilton Federalist No. 78 ("No legislative act, contrary to the Constitution, can be valid.")

[17] First, *Kahn* relies on precedent holding that when normal relations between opposing governments are suspended, so too are limitations periods. *Id.* at 503. Second, the Federal government could rely on its War Power and treaty-making power, to impose its law upon its conquered enemy in whatever manner deemed necessary to eradicate any evils of that war, issues not present here. *Id.* at 506-07.

the Korean War. He is now retired from his work. His health is failing and he has suffered a stroke. Other than the pending case, he has no criminal record either before or since these allegations.[18] He should be permitted to rely on the State's own law which protects him from these charges ranging in time from twenty-six (26) to forty-seven (47) years ago. If it does not, then we all suffer, for if California is successful in depriving Petitioner of this right in this situation, then such right has been effectively destroyed for all persons the States may choose to prosecute, no matter how distant in time and memory the conduct may be. No matter how long the State has promised otherwise. No matter how final the rule has been expressed to be.

III. Due Process

Whether or not the Court takes a view of the *Ex Post Facto* Clause that Petitioner's case does not fit within any Calder category, the question remains whether it is fundamentally unfair to deprive Petitioner of a vested right[19] which protected him from

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[18] American Psychological Association et al., argues that this law is necessary because in general, persons convicted of child molestation reoffend. This fact is irrelevant to this case and in essence asks this Court to presume persons accused of molest guilty. Based on this subversion of the presumption of innocence, Amici asks the Court to structure the Penal Code and Constitution around such a premise. Our laws and Constitutions recognize, particularly in criminal matters, that it is a basic logical fallacy to argue that what is true of the group at large must be true of the individual specifically.

[19] The Supreme Court cases cited in Respondent's Due Process section are economic rather than criminal cases and are inapposite even on their own terms. (Respondent Brief 35-6.) All involved adjustment of remedies in an economic arena where the legislation came with presumptions of constitutionality, presumptions not applicable here. *See Ferguson v. Skrupa*, 372 U.S. 726 (1963). None involved the creation or recreation of

retroactive legislation such as 803(g). *Cf. Weaver v. Graham*, 2450 U.S. 24 (holding that ex post facto analysis not dependant on vested rights).

The Court is invited to reexamine the interplay the Statute of Limitations has as a substantive right[20]

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criminal causes of action or implicated personal liberty interests. It is a strain then to reason as does respondent, that the *Chase* and *Danzer* line of cases dealing with the expiration of causes of action resulting from time bars had anything to do with the principles announced in cases concerned solely with readjusting remedies for pre-existing ongoing rights. *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Danzer & Co. v. Gulf S.I.R., Co.*, 268 U.S. 633 (1925). To assume further that *Usery et al.*, intended to overrule these principles while never addressing them and relying on other principles and precedent that dated from the same era as *Danzer* and *Chase*. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Usery et. al.*, never even name *Chase* and *Danzer*, to distinguish, overrule or analogize.

Even if the *Usery* doctrine stood for the broader proposition that creating new causes of action, even retrospectively, is an appropriate legislative measure in the economic field is still a far cry and implicates different assessments when one considers that the courts and legislatures are engaged in "settling expectations" amongst private litigants. Creating retrospective criminal causes of action against the citizenry implies and involves principles of different scope and magnitude and certainly do not come to the table with presumptions of constitutionality. Finally, the question may perhaps remain whether or not in the economic realm the destruction of a cause of action simultaneously vests in one party or another any rights in relationship thereto. However, in this criminal case, a long line of cases, California and other jurisdictions, have held precisely that in the criminal field the expiration of a Statute of Limitations indeed vests a substantive right. The cause of action having been destroyed and the right vested, liberty as opposed to economic expectations are implicated and must be vindicated under established principles of due process.

[20] *Guaranty v. York* held that State Statutes of Limitations were substantive rather than merely procedural and therefore warranted their use in federal diversity cases. In so doing it stated, a "statute that would completely bar recovery in a suit if

replacing and mirroring Constitutional Amendments in its scope. For it is clear that merely providing trial related procedures while divesting Petitioner of this right does not resolve the harm or the due process issue. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe v. Ullman*, 367 U.S. 497, 541(1961)(Harlan J., dissenting).

CONCLUSION

That Statutes of Limitations were contemplated early on in American history is clear from *Calder v. Bull*. That they posed a potential *ex post facto* problem is of more importance. See *Calder v. Bull*, 3 U.S. at 290-91, *Moore v. State* 43 N.J.L. 203, 1881 WL 8329 *6 (1881); *Falter v. United States*, 23 F.2d 420, 425 (1928). *Calder* dealt with Statutes of Limitations in the following manner:

> But I do not consider any law *ex post facto*, within the prohibition, that *mollies the rigor of the criminal law*, but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before

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brought in a State court bears on a State created right vitally and not merely formally or negligibly." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945).

committed, and the like; is retrospective. *Calder v. Bull*, 3 U.S. at 391 (emphasis added).

Clearly mollifying the rigors of criminal law sets the tone for interpreting the phrase to "save time from the Statute of Limitations." In this context, the retroactive effect is intended to benefit the defendant and not the government. It is a stretch to import any other meaning therein.

For all the aforementioned reasons, relief should be granted and the prosecution dismissed.

Dated this 20th day of March, 2003

Respectfully submitted,

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